Cert. denied 376 Md. 52 (2003)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 923

September Term, 2000

ADNAN SYED

v.

STATE OF MARYLAND

Murphy, C.J.,
Adkins,
Bishop, John J., Jr.,
(Ret'd, specially assigned),

JJ.

Opinion by Murphy, C.J.

Filed: March 19, 2003

#199103042

In the Circuit Court for Baltimore City, a jury convicted Adnan Syed, appellant, of first degree murder, robbery, kidnaping and false imprisonment. The State's evidence was sufficient to prove that appellant committed those offenses. Appellant argues that he is entitled to a new trial. In support of that argument he has presented several questions for our review,[1] which we have rephrased as follows:

> I. Whether the State committed prosecutorial misconduct, violated *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] and violated Appellant's due process rights when it (1) suppressed favorable material evidence of an oral side

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[1] Appellant included the following sub-parts to question one:

1. Whether the State suppressed favorable material evidence and introduced and elicited false and misleading testimony relating to the plea agreement with its key witness in violation of *Brady*?

2. Whether the State's actions constituted prosecutorial misconduct?

3. Whether the trial court committed reversible error in prohibiting Appellant from calling [Wilds' attorney] and recalling Wilds as a witness?

4. Whether the trial court committed reversible error in restricting the cross-examination of Wilds?

5. Whether the trial court committed reversible error in denying Appellant's motion to strike the testimony of Wilds?

6. Whether the trial court committed reversible error in precluding Appellant from calling Ms. Julian as a witness?

7. Whether the trial court committed reversible error in denying appellant's motion to disclose documents and information from the State?

8. Whether the trial court committed reversible error in denying Appellant's motion to question [the prosecutor] out of the presence of the jury?

agreement with its key witness, and (2) when it introduced false and misleading evidence?

II. Whether the trial court committed reversible error in prohibiting Appellant from presenting evidence to the jury?

III. Whether the trial court erred in admitting hearsay in the form of a letter from the victim to Appellant, which is highly prejudicial?

IV. Whether the trial court erred in permitting the introduction of the victim's 62-page diary, which constituted irrelevant prejudicial hearsay?

For the reasons that follow, we shall affirm the judgment of the circuit court.

Factual Background

Appellant was convicted of killing his former girlfriend, who was last seen alive about 2:30 p.m. on January 13, 1999. On January 25, 1999, appellant was questioned by police regarding the victim's disappearance. Appellant stated that he dated the victim, that on January 13, 1999, the two of them were in a late afternoon class, that after class he went to track practice, and did not see the victim during the next two days because school was closed for inclement weather.

On February 9, 1999, the victim's body was found in Leakin Park by one Alonso Sellers. The body was 127 feet from the road and was well hidden. The Medical Examiner determined that the

victim had been strangled, but was unable to determine when she had been killed.

Jay Wilds, the State's primary witness,[2] testified as follows. At 10:00 p.m. on January 12, 1999, appellant called him and asked what he was doing the next day. He replied "nothing," and that was the end of the conversation. At 10:45 a.m. the next morning, January 13, 1999, appellant called him again. He told appellant that he needed to buy a gift for his girlfriend, and appellant offered to take him shopping. They went to Security Square Mall, shopped for about one and a half hours, when appellant said he needed to go back to school. On the way to school, appellant said that his relationship with the victim was not going well, that the victim made him mad and that, "I am going to kill that bitch." Appellant told Wilds that he could borrow appellant's car as long as he picked appellant up after school. Appellant gave his cell phone to Wilds so that appellant could call him when appellant was ready to be picked up.

Later that day, appellant called the cell phone and asked to be picked up at Best Buy. When Wilds arrived, he saw appellant standing near a payphone outside of Best Buy. Appellant, who was wearing red gloves, directed Wilds to park near a gray Nissan Sentra automobile, and asked him if he was "ready for this."

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[2] Wilds' direct examination took place on February 4, 2000. He was cross-examined on February 4, 2000, February 10, 2000, February 11, 2000, February 14, 2000, and February 15, 2000. His re-direct examination occurred on February 15, 2000, and he was subjected to re-cross examination that same day.

Appellant then opened the trunk of the Sentra to reveal the victim's body. At this point, appellant got into the Sentra and told Wilds to follow in appellant's car. They drove to a Park and Ride on Interstate 70, where Wilds parked appellant's car and got into the Sentra with appellant.

Appellant said, "it's done," and that killing [the victim] kind of hurt him but not really." Appellant asked, "how can you treat someone like that that you are suppose to love?" then said that, "all knowing is Allah," and that he needed to get back to track practice because he needed to be seen. Using appellant's car, Wilds drove appellant back to school. As he got out of the car, appellant said, "motherf***ers think they are hard, I killed someone with my bare hands."

After dropping appellant off at school, Wilds went to Kristi Vincent's house, where he smoked some marijuana, and debated what to do. About thirty minutes after he had arrived at Vincent's house, appellant called him and asked to be picked up at school. He picked up appellant and brought him back to Vincent's house, where they fell asleep on the floor after smoking marijuana. Later on in the evening, appellant got a call from the victim's parents asking if he had seen her. Appellant said that he had not and suggested that they call her current boyfriend. Appellant then received a call from the police, asking if he knew where the victim was. Appellant replied that he did not know.

At this point, Wilds and appellant left Vincent's home.

Appellant told Wilds, " you have got to help me get rid of [the victim]." He agreed to help appellant because he feared that appellant would use appellant's knowledge of his drug dealing against him. He took two shovels from his house, put them in appellant's car, and drove to the victim's car. Appellant drove the victim's car, with Wilds following in appellant's car. About forty-five minutes later, they ended up in Leakin Park.

Wilds paged Jennifer Pusiteri at 7:00 p.m. from Leakin Park.[3] While Wilds and appellant were digging a hole, Pusiteri called appellant's cell phone. Appellant answered the phone, told Pusiteri that they were busy, and hung up. Appellant asked Wilds to help him get the victim out of the car. Wilds refused. Appellant took the victim's body to the shallow grave. As appellant began to cover the victim with dirt, he received another call. During the phone conversation, appellant spoke in Arabic and in English. After the call, appellant finished burying the body and parked the victim's automobile near some apartments. Appellant stated, "it kind of makes me feel better and it kind of doesn't." They then went to Value City, where they threw away some of the victim's belongings in a dumpster.

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[3] Jennifer Pusiteri's testimony essentially corroborated Wilds' version of the events that transpired on January 13.

Wilds then paged Jennifer Pusiteri.

Appellant drove Wilds home, where he changed his clothes and put them in a bag. Pusiteri came to Wilds' home and drove him to a Super Fresh supermarket, where he threw the shovels and the bag of clothing into a dumpster. Wilds told Pusiteri that he wanted her "to be the one person to know that I didn't kill [the victim]."

Detective MacGillivary testified as follows. On February 9, 1999, he responded as the primary detective to Leakin Park, where the victim's body was recovered. Based upon information contained in [the victim]'s missing person report, he obtained appellant's cell phone records. On February 26, 1999, he went to Jennifer Pusiteri's home and asked her to accompany him to the police station to talk. Jennifer came to the station that night and gave a statement. She said that she heard that the victim had been strangled, although that information had not yet been publically released.

Wilds told him that when appellant showed Wilds the victim's body in the trunk, the victim's car was parked on Franklintown Road. He interviewed Wilds a second time on March 15, 1999, and confronted Wilds with appellant's cell phone records. After he pointed out that Wilds' statement did not match the phone records, Wilds "remembered things a lot better." Wilds gave a third statement on April 13, 1999, and admitted that he lied on

the two previous occasions to cover up the fact that he bought and sold marijuana.

During a February 26, 1999 interview that took place at appellant's home, appellant stated that he had a relationship with the victim, and had been in her car before, but was not in her car on January 13, 1999, although he could not remember what happened on January 13, 1999.

I.

Appellant argues that the State committed a *Brady*[4] violation when, prior to trial, it failed to disclose information pertinent to the impeachment of Jay Wilds. According to appellant, the *Brady* rule was violated by (1) the prosecutor's failure to disclose that he had recommended to Wilds that Wilds obtain an attorney, and then assisted Wilds in finding one; and 2) the prosecutor's failure to disclose all of the circumstances surrounding Wilds' plea agreement.

A. Wilds' Cross-examination

Appellant argues that Judge Heard erroneously restricted the cross-examination of Wilds. There is no merit in this argument.[5]

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[4] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[5] The scope of examination of witnesses is a matter left largely to the discretion of the trial court and no error will be recognized in the absence of a clear abuse

(continued...)

Wilds was questioned by police officers on three occasions. The first time Wilds spoke to the police, he said he was not involved in killing or burying the victim. On February 28, 1999, the police questioned him for two hours, and then turned the tape recorder on, and questioned him for two more hours. Wilds testified that police confronted him with information Jennifer Pusiteri had told them earlier when she was questioned by police,

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[5](...continued)
of discretion. *Conyers v. State*, 354 Md. 132, 729 A.2d 910, 925 (citing *Oken v. State*, 327 Md. 628, 669, 612 A.2d 258, 278 (1982), *cert. denied*, 507 U.S. 931, 113 S.Ct. 1312, 122 L.Ed.2d 700 (1993), and *Trimble v. State*, 300 Md. 387, 401, 478 A.2d 1143, 1150 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985)).

* * *

There was no formal proffer of what the witness would say other than the statement that we have quoted to the effect that she could testify how long he was in Shock Trauma, how long he was in University Hospital, and his condition since the time of those hospitalizations. We note that in *Mack v. State*, 300 Md. 583, 603, 479 A.2d 1344 (1984), the Court of Appeals said, "The question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded evidence would have been." (citing *Hooton v. Kenneth B. Mumaw Plumbing & Heating Co.*, 271 Md. 565, 571, 318 A.2d 514, 517 (1974); *Keys v. Keys*, 251 Md. 247, 250, 247 A.2d 282, 285 (1968); *Katz v. Simcha Co., Inc.*, 251 Md. 227, 239, 246 A.2d 555, 562 (1968); *Fowler v. Benton*, 229 Md. 571, 575, 185 A.2d 344, 347 (1962); and Maryland Rule 3-517(c)(formerly Maryland Rule 522(b)).

Green v. State, 127 Md. App. 758, 766, 736 A.2d 450 (1999). *See also Merzbacher v. State*, 346 Md. 391, 416-17, 697 A.2d 432 (1997)("Ordinarily, a formal proffer of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence.") Here, as in *Green, supra,* appellant failed to offer a formal proffer as to why the *Brady* doctrine was violated or the cross-examination of Wilds should have been less restrictive, and thus, the issues have not been properly preserved for appeal. Nevertheless, we will address appellant's arguments.

that he lied to the police about the location of the victim's car, and that he also claimed that he had walked to the mall on January 13.

On March 15, 1999, Wilds told the officers that appellant had stated on January 12 that "he was going to kill that bitch," but later said that appellant made this statement four days before January 12. On April 13, 1999, Wilds told police that appellant had killed the victim in Patapsco State Park, and that appellant paid him to help. Wilds eventually took the police to where the victim's body was buried and to where the victim's car was located.

On direct examination, Wilds identified the signed plea agreement in which he admitted to being an accessory after the fact to the victim's murder. When asked about the nature of the plea agreement, Wilds replied:

> Well, if I tell any kind of lie, it voids it and it's no good. It's a truth agreement, and that's about it, a cap. As long as I tell the truth, I can only get a certain amount of years.

The plea agreement was admitted into evidence without objection. On cross-examination, Wilds testified that he signed the agreement on September 7, 1999. When the cross-examination focused on the question of whether Wilds had actually entered a guilty plea to being an accessory after the fact, the jury was excused, and appellant's counsel argued the following:

[Appellant's Counsel]: What I am seeking to get out and what I think I am entitled to for two reasons, this witness has been presented to this jury as not only a witness who has entered a plea agreement which then makes that the subject of impeachment, what the agreement was, how much it was limited to, whatever. But he has now been presented in direct as a witness who has pled guilty. In terminology, this witness has acceded he understands [sic] because he freely answered those questions, and there were four of them following that about the when [sic] he pled guilty.

In fact, this witness has not entered a guilty plea.

* * *

The Court: But, [appellant's counsel], isn't it a fact that the purpose of your questions is to determine whether or not he has any bias, motive, interest in testifying one way or another based on promises he believes that he has, not whether -

[Appellant's Counsel]: Yes, sir [sic], and I plan to get there.

The Court: Wait a minute. Not whether, in fact, they are promises, whether or not they are, in fact, promises that will be kept to him, but whether or not they are influencing his testimony today. So in that regard, it really doesn't matter whether they called it a guilty plea or not but,

rather, whether or not you have the latitude to inquire into any promises that have been made.

Appellant's counsel argued that Wilds' guilty plea was not valid because of failure to comply with Md. Rule 4-242, and the trial court responded, "[Appellant's trial counsel], you are arguing Mr. Wilds' point on appeal of his guilty plea. If, [for] some reason, Judge McCurdy did not follow the 4-242 litany, that's for another day and another court to decide." The court then ruled:

The Court: [Appellant's counsel], may I make a suggestion then, in light of your argument, that we will do the following: I will allow you to inquire as to what this witness recalls being done during his guilty plea proceeding. That is, he has already said he wasn't under oath, and anything else that you would like to draw out. Then in the instructions to the jury, I will be happy to advise the jury what a guilty plea is under the rules. And if you would like to structure an instruction -

[Appellant's Counsel]: I will do so.

The Court: -that would outline what a guilty plea is, and then we can utilize it in that fashion, because I think what you are trying to do is, at this juncture, argue the law mixed with a witness who may not know that certain procedures under 2-242 [sic]

> may or may not have been followed.
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> * * *
>
> I know that the State may not agree but the court's concern is that if this witness believes that he was engaged in a guilty plea and that, as a result of that guilty plea, that his promise is binding in some fashion and that is directing his testimony, the defense has a right to inquire as to the basis for that belief. And if for some reason it is a faulty belief, then the jury is entitled to hear what it is that may have happened during the guilty plea that this witness does not either recall or may have forgotten or was not done, and opens him up to a challenge to his credibility.

When cross-examination resumed, Wilds testified that he understood that he faced up to five years in prison as an accessory after the fact, and that the ultimate disposition of his case would occur after the State determined whether he had kept his end of the bargain, *i.e.*, to provide truthful testimony.

Wilds' plea agreement came up again several days later, after the court took testimony from another witness. During his subsequent cross-examination, Wilds testified that the State helped provide him with an attorney and that this assistance was provided before he was charged as an accessory after the fact.

After further cross-examination of Wilds, appellant's

counsel viewed a videotape of Wilds' plea hearing. When appellant's counsel pointed out that no verdict was actually entered on the plea, Judge Heard agreed, stating that the file indicated that the verdict on the plea was held *sub curia*, and that Wilds' file was "very, very odd and unusual and I can see why would [sic] [appellant's counsel] would start to wonder." The State then argued that the plea statute does not require the plea to be conducted in one proceeding, and the trial court agreed. At this point, it became apparent that there was a subsequent proceeding, in the chambers of Judge McCurdy, at which Wilds and his attorney were present, but at which the prosecution waived its presence. The trial court stated:

> She has a witness on the stand there's been a hearing involving this witness that may or may not reflect on the credibility of this witness, we don't know if the proceeding was under oath, we don't know what he said during the proceeding, we don't know what he was asked during the proceeding, but he is your star witness in your case. She's reviewed a statement, it's the guilty plea, but there was another hearing held involving this very same witness for which she has no clue what it's about and to ask or inquire blindly means she doesn't know what she's dealing with. Perhaps we could bring him in and ask him. Perhaps he knows. But you [the State] can understand why she might want that information as a lawyer.

After the jury was excused for the remainder of the day, the court, appellant's counsel, and the prosecutor all questioned

Wilds on the terms of his plea agreement.[6] At this point, Wilds testified as follows. He appeared before Judge McCurdy, in court, for a guilty plea. A subsequent hearing was set, but that hearing did not take place because disposition would depend upon what Wilds did at appellant's trial. He later met with his attorney and Judge McCurdy in the judge's chambers. No one from the State's Attorney's Office was present at this meeting. He did not know if the State's Attorney's Office knew about the meeting, and no one from the State's Attorney's Office had asked him about what happened at that meeting.

Appellant's counsel then questioned Wilds about (1) why he was concerned about his attorney's representation, (2) who he spoke to in Judge McCurdy's chambers about that concern,[7] (3) whether he indicated that he wanted to withdraw or alter a plea agreement,[8] (4) whether, after his attorney told him to be in Judge McCurdy's chambers the next day, he spoke to any detectives or anyone from the State's Attorney's Office,[9] (5) who was

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[6] The court began by making clear that it was not seeking to learn about any conversations between Wilds and his attorney.

[7] Wilds left a voice mail message on Judge McCurdy's voice mail. He also testified that he contacted the State because he believed they would have [his attorney's] telephone number. He testified he spoke with the assistant prosecutor, Ms. Murphy, who informed him that she would try to get [his attorney's] number for him.

[8] Judge McCurdy did ask Wilds if he wanted to withdraw the plea agreement. Wilds did not indicate that he wanted any such alteration or withdrawal of the plea.

[9] Wilds testified he did not speak to any police or anyone connected with the State's Attorney's Office.

present at this meeting in chambers,[10] (6) whether he was concerned that his lawyer was not representing his best interest,[11] (7) whether he told Judge McCurdy about those concerns and whether he told Judge McCurdy if he wanted a different lawyer,[12] (8) the circumstances surrounding his first meeting with his lawyer and the manner in which he was informed of the pending charges that were going to be filed against him,[13] (9) whether he understood that his attorney's *pro bono* representation, meant that he would not be charged for her services, (10) whether he understood that there were other lawyers that he could have selected, (11) what his lawyer may have told Judge McCurdy about how she came to represent him,[14]

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[10] Wilds testified it was just him, his lawyer, and Judge McCurdy, and that a video camera was turned on during the conversation.

[11] Wilds testified he was concerned about who his attorney was representing.

[12] Wilds testified that he had told Judge McCurdy that he thought "things smell fishy." Wilds also testified that prior to the meeting in chambers, he and his lawyer had talked and that Wilds' concerns had been "laid to rest." Wilds also testified that he did not want a different lawyer representing him. Wilds also explained that his concern was that his attorney did not keep in touch with him.

[13] Wilds testified the he was first given his charging documents, and then taken up to meet the prosecutor, who introduced him to his attorney. Wilds also explained that his attorney "wasn't forced on me. It wasn't like they said, this is your lawyer. They asked me, they said well, you can meet with her and see if you want her to be your lawyer."

[14] Wilds testified that his attorney told Judge McCurdy that she had been contacted by the State and that she looked at Wilds' case before deciding whether to take his case.

and (12) how long the chambers meeting lasted.[15]

Upon inquiry by the State, Wilds testified that the Public Defender's Office would not represent him until he had been charged with a crime, that he was very satisfied with his attorney's representation, that his attorney informed Judge McCurdy that she came to represent Wilds because "she does *pro bono* work and that she found a case where she felt there was a need where someone needed help."

Following argument, Judge Heard ruled that appellant would be permitted to continue cross-examination of Wilds, but that the circumstances surrounding the in chambers meeting was "a dead end," that "there is nothing there," and that such inquiry was a "totally collateral area none of which would be admissible." However, the court made clear that any questions appellant had about Wilds' concerns about his attorney could be asked in front of the jury. On the next trial date, the court stated:

> Mr. Wilds on cross, [appellant's counsel] may ask and I believe we stopped short of these particular questions, can ask whether or not he picked his lawyer. She can ask whether he wanted to keep his lawyer. She can ask whether or not there was - at any time he was concerned about his lawyer, whether or not that concern was clarified in some way.
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> * * *
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> Now, if [appellant's counsel] wants to

[15] Wilds testified that the meeting in chambers lasted about fifteen to twenty minutes altogether.

ask those very same questions so that the jury gets the benefit of hearing that, I have no problem with that because it does go into the mind he had at the time he was making a decision to plea guilty. It affected him and as I explained to you I view that as a benefit that was derived, some assistance that the State's Attorney got - used in helping him secure a lawyer.

It doesn't mean you brought the lawyer for him. It doesn't mean you paid the lawyer. It just means that you did certain things. The State did certain things and as a result of what you did it made it easier for Mr. Wilds to select a lawyer, but ultimately he selected the lawyer, and that information did not come out in front of the jury, and if [appellant's counsel] wants to bring that out or if you want to clarify that information in front of the jury. It goes to the state of mind, his contemplation as to what he was getting in exchange for pleading guilty and assisting the State, and to the extent defense counsel wants to argue it was a benefit and you want to argue it wasn't a benefit, the jury could decide what benefit, if any, has effected [sic] the witness's credibility.

On the fifth and final day of Wilds' testimony,[16] he was cross-examined about the details surrounding his plea agreement and how he came to be represented by his attorney:

[Appellant's Counsel]: And [the prosecutor] introduced himself to you, you of course asked him now when am I going to get charged?

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[16] Wilds testified before the jury that (1) before September 6, 1999, he spoke with the Public Defender's Office, but they would not provide him with representation until he had been charged, (2) when police came to pick him up on September 7, 1999, he did not know that day that he would be entering a plea. The police did not tell him that he was being taken to the State's Attorney's Office, and he had never been in the prosecutor's office before that day. Wilds confirmed that prior to the meeting with the prosecutor, he had not been charged, he had not been before a Commissioner, and he had not seen a judge. The police did not tell or coerce Wilds into working out a deal.

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: And did he express questions himself?

[Mr. Wilds]: He told me that he had someone he would like me to meet.

[Appellant's Counsel]: He had somebody - the very first thing he said was there's somebody that I want you to meet?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And at that point he had introduced himself to you. Had you spoken back to him?

[Mr. Wilds]: I believe I said hello.

[Appellant's Counsel]: And did you ask him for help with picking a lawyer?

[The State]: Objection.

[The Court]: Overruled.

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Did you ask for any assistance from him at all?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Did you tell him you wanted a lawyer, even though you might not have asked for his help?

[Mr. Wilds]: I believe he told me I was going to need one.

[Appellant's Counsel]: He told you that you were going to need one, and then he told you there's somebody he'd like you to meet?

[Mr. Wilds]: Yes, ma'am.

According to Wilds, the prosecutor described his attorney as "a very good lawyer, defense attorney, and that she takes - she does some pro bono work." He understood that *pro bono* meant that the legal services would be free. After meeting with his attorney for approximately one hour and thirty minutes, the prosecutor, Wilds' attorney and Wilds discussed a plea agreement. This was the first time he was presented with a plea agreement and by the end of this meeting, the plea agreement had been totally negotiated. After the plea agreement was signed, the parties went to the courthouse.

The following transpired when Wilds was asked whether he understood that the State would be making certain recommendations at his sentencing:

[Appellant's Counsel]:	Well, sir, you understood that one of the recommendations, one of the agreements in this agreement that obligates [the prosecutor] is that if you complete all of the terms and conditions stated in the agreement to the satisfaction of the State, that's [the prosecutor], right, the State?
[Mr. Wilds]:	Yes, ma'am.
[Appellant's Counsel]:	That the State will recommend the sentence of five years -
[The State]:	Objection.
[Appellant's Counsel]:	- to the Department of Correction with all but two years suspended?

The Court: Overruled. Is that your understanding?

[Mr. Wilds]: Yes, ma'am.

* * *

[Appellant's Counsel]: Okay. And in fact, item D says that if you fail to complete each and every obligation under the agreement the State will recommend a sentence as follows, five years to the Department of Corrections; is that correct?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And you also, sir, understood that actually what sentence you receive at any point in time when you come up for sentencing when your guilt plea is concluded, is really up to the judge?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And that ultimately only the judge gets to decide?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: Right? But that the determinations of whether or not you met your obligations will always be up to [the prosecutor].

[The State]: Objection.

The Court: Overruled.

[Appellant's Counsel]: Will it not?

The Court: Is that your understanding?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]:	Now, Mr. Wilds, the plea agreement, the Truth Agreement as you call it, doesn't say anything about the benefit of having a lawyer, does it?
[The State]:	Objection.
The Court:	Overruled. Does the agreement say anything about the benefits of having a lawyer?
[Mr. Wilds]:	No, ma'am.
[Appellant's Counsel]:	And, sir, when you signed that agreement on the 7th of September, did you regard it as a benefit provided to you?
[Mr. Wilds]:	No, ma'am.
[Appellant's Counsel]:	Did you think it was a good thing?
[Mr. Wilds]:	Having a lawyer?
[Appellant's Counsel]:	Yes.
[Mr. Wilds]:	Yes, ma'am.
[Appellant's Counsel]:	That day?
[Mr. Wilds]:	Yes, ma'am.
[Appellant's Counsel]:	And did you think it was something that [the prosecutor] had provided?
[The State]:	Objection.
The Court:	Overruled. What did you think?
[Appellant's Counsel]:	In your mind?
[Mr. Wilds]:	At that point and time, yes.

[Appellant's Counsel]: Yes. And did [the prosecutor] ever tell you that that was a benefit that he was providing you?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Did you not come to regard it at some point as a good thing that you got a free lawyer?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And did you not come to think of it as something that was sort of part of the whole deal?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Did you think that having a lawyer went with in any way the plea agreement that you signed?

[Mr. Wilds]: No, ma'am.

* * *

[Appellant's Counsel]: Yes. Mr. Wilds, when there came the time that you had questions about her, you also had questions about the plea that had gone down that day, did you not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: You thought, in your words, that things smelled fishy, did you not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And by the use of that term you meant they didn't smell quite right, did you not?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Well, I want to make sure.

[Mr. Wilds]: I'm agreeing with you.

[Appellant's Counsel]: That they didn't smell right?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And by not smelling right, that didn't make you feel too good, did they?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: You came to have questions about how it was that [the prosecutor] provided you a lawyer, did you not?

[The State]: Objection.

The Court: Overruled.

[Appellant's Counsel]: Did you not?

The Court: Is that the reason that you thought it smelled fishy?

[Mr. Wilds]: No, ma'am.

[Appellant's Counsel]: Well, sir, you had thought like it sure felt like a conflict, did you not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: That was the word that you used, was it not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: The conflict was that it didn't appear to you that the lawyer might be working for his interest?

[The State]: Objection.

The Court: Overruled.

[Appellant's Counsel]: Did you not?

The Court: Is that what you were thinking Mr. Wilds?

[Mr. Wilds]: Somewhat.

[Appellant's Counsel]: Somewhat. And you knew that it wasn't quite right if the lawyer is working for his interest but acting as your lawyer, isn't that correct?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And that's what you meant by it smelled fishy, is it not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: And you questioned, in fact, whether or not this lawyer that you met in the prosecutor's office who was prosecuting you was just brought in to make you make the plea, did you not?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: That's what you thought?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: In your mind?

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: Even after this day, isn't that correct?

[Mr. Wilds]: Which day?

[Appellant's Counsel]: The 7th of September.

[Mr. Wilds]: Yes, ma'am.

[Appellant's Counsel]: No more questions.

On redirect-examination, Wilds testified that he felt he had a choice in selecting his attorney, that it was his decision to select his attorney, and that he was satisfied with her representation.

The following propositions are applicable to appellant's *Brady* arguments:

> The Supreme Court made clear in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215. In order to establish a Brady violation, Petitioner must establish "(1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense - either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness - and (3) that the suppressed evidence is material." *Ware v. State*, 348 Md. 19, 38, 702 A.2d 699, 708 (1997). Evidence that is obviously favorable must be disclosed even absent a specific request by the defendant. *See* Maryland Rule 4-263(a); *United States v. Agurs*, 427 U.S. 97, 110-11, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976).
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> Impeachment evidence, as well as exculpatory evidence, is "evidence favorable to an accused." *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994);

United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986); *Ware*, 348 Md. at 40-41, 702 A.2d at 709-710; *Chavis v. North Carolina*, 637 F.2d 213, 223 & n.14 (4th Cir. 1980); *United States v. Sutton*, 542 F.2d 1239, 1241-42 (4th Cir. 1976); *Jimenez v. State*, 112 Nev. 610, 918 P.2d 687, 694 (Nev. 1996); *c.f. Napue v. United States*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)(holding that the prohibition against the use of false testimony applies even when the evidence goes only to the credibility of the witness because the jury's assessment of credibility can be determinative of guilt or innocence).

The failure to disclose evidence relating to any understanding or agreement with a key witness as to a future prosecution, in particular, violates due process, because such evidence is relevant to witness's credibility. *See Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104. The Supreme Court explained in *Giglio* that, when the government depends almost entirely on the testimony of a key witness to establish its *prima facie* case and the witness's credibility, therefore, is an important issue, "evidence of *any* understanding or agreement as to a future prosecution would be relevant to his credibility...." *See id[.]* (emphasis added). This Court underscored the same point in *Ware* when we concluded that "the prosecutor's duty to disclose applies to *any* understanding or agreement between the witness and the State." *Ware*, 348 Md. at 41, 702 A.2d at 710 (emphasis in original).

The standard for measuring the materiality of the undisclosed evidence is strictest if it "demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U.S. at 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342. In *Agurs*, the Supreme Court explained that "a conviction obtained by the knowing use of perjured testimony is